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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

MAR 10 1997

In the Matter of )  
 )  
Amendment of the Commission's Rules to ) GN Docket No. 96-228  
Establish Part 27, the Wireless )  
Communications Service )

**EMERGENCY MOTION FOR STAY**

THE WIRELESS CABLE ASSOCIATION  
INTERNATIONAL, INC.

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## EXECUTIVE SUMMARY

The wireless cable industry and educational users of ITFS facilities require a temporary stay of the rules and policies adopted in the Commission's *Report and Order* establishing the Wireless Communications Service ("WCS") and the April 15, 1997 commencement date of the Commission's auction of licenses in the WCS, until such time as the Commission has resolved the issues raised in the contemporaneous Petition for Expedited Reconsideration (the "Petition") of the *Report and Order*. In the Petition, the Wireless Cable Association International, Inc. ("WCA") requests that the Commission impose a power limitation of 20 watts EIRP on WCS licensees in order to avoid blanketing interference that could have a serious adverse impact on MDS and ITFS licensees.

The circumstances of this case satisfy all criteria for a temporary stay. First, WCA's Petition is likely to succeed on the merits. Specifically, the Petition establishes that the Commission erred in assuming that no power limitation on WCS licensees is necessary because the wireless cable industry, in connection with a migration to digital technology, is "converting to newer, more robustly designed downconverters that have vastly improved frequency selectivity and would not receive WCS signals." In fact, the Petition establishes that many wireless cable systems, particularly those serving more rural communities, and many independent ITFS systems are unlikely to convert to digital modulation because they cannot bear the costs associated with digital operations. Also, many of the wireless cable systems that anticipate converting to digital modulation have been installing "digital ready" downconverters for some time now which do not preclude WCS interference, and will not be replacing those downconverters in connection with a conversion to digital transmission technology. Third, and most importantly, *it is impossible for equipment manufacturers to design downconverters that will eliminate blanketing interference from WCS where there are no power limitations on WCS licensees*. Thus, the solution envisioned by the Commission — the routine replacement of MDS and ITFS downconverters with equipment capable of rejecting interfering signals from high-power WCS operations — simply does not exist.

Second, wireless cable operators and ITFS service providers will suffer irreparable harm in the absence of a temporary stay. Were the Commission to proceed with the WCS auction and permit the launching of high-power WCS services, wireless cable systems and distance learning operations would suffer damaging electrical interference.

Third, the public interest clearly merits a stay. A stay would ensure that the valuable public interest benefits of vibrant wireless cable and distance learning systems, benefits which the Commission has recognized on numerous occasions, remain available. Moreover, a temporary stay will further serve the public interest by providing WCS auction participants with sufficient advance notice of all interference protection requirements that will be imposed upon WCS authorizations before they place valuations on WCS spectrum and devise their bidding strategies.

Finally, a temporary stay of the WCS auction will not substantially harm other parties. A stay will not necessarily delay the commencement of the WCS auction, if the Commission rules promptly on the Petition. But even a delay of the auction will not result in substantial harm. To the contrary, potential WCS bidders will *benefit* from a temporary stay in that it will provide them with additional time to evaluate WCA's technical showing, determine how the potential for interference to MDS and ITFS operations will affect their usage of WCS spectrum and submit comments to the Commission that might lead to an expedient resolution of the problem before the bidding.

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**EMERGENCY MOTION FOR STAY**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby requests that the Commission stay the rules and policies adopted in the Commission's *Report and Order* in the above-captioned proceeding (the "*WCS Order*"),<sup>1/</sup> as well as the April 15, 1997 commencement date for the auction of licenses in the Wireless Communications Service ("WCS"), until such time as the Commission has issued a decision on WCA's contemporaneous Petition for Expedited Reconsideration ("Petition") of the *Report and Order*.

**I. INTRODUCTION.**

In the *WCS Order* the Commission adopted rules and policies that will govern the newly-created WCS. In the proceeding leading up to adoption of the *WCS Order*, BellSouth Corporation ("BellSouth") put evidence into the record demonstrating that blanketing

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<sup>1/</sup> FCC 97-50 (rel. Feb. 19, 1997). WCA is the principal trade association of the wireless cable industry. Its membership includes virtually every wireless cable operator in the United States, the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators, producers of video programming and manufacturers of wireless cable transmission and reception equipment. MDS and ITFS licensees operate in the 2.1 and 2.5-2.7 GHz frequency bands. Accordingly, as discussed in greater detail herein, WCA's membership has a vital interest in the Commission's rules for the Wireless Communications Service ("WCS") insofar as they relate to interference protection from WCS licensees operating in the 2.3 GHz band.

interference will result from high power WCS signals in close proximity to MDS and ITFS receivers. Specifically, BellSouth established that the Commission should restrict WCS operations to 20 watts EIRP absent the consent of potentially impacted MDS and ITFS licensees.<sup>2/</sup> The only filings in response to BellSouth's submission were supportive of BellSouth's request for the imposition of a 20 watt EIRP limitation on WCS.<sup>3/</sup> Nonetheless, the Commission refused to impose a power limitation on WCS licensees, apparently because it assumed that, in connection with the transition to digital technology, the wireless cable industry "is converting to newer, more robustly designed downconverters that have vastly improved frequency selectivity and [will] not receive WCS signals."<sup>4/</sup>

As set forth in greater detail below and in WCA's Petition, the need for a stay in this matter arises from the impending commencement of the Commission's auction for WCS authorizations and the serious and irreparable injury that the wireless cable industry and educators who rely on ITFS distribution facilities will suffer if the issues raised in the Petition are not addressed before WCS operations commence. In just a little more than a month, the Commission

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<sup>2/</sup> See *Ex Parte* Statement of BellSouth Corporation, GN Docket No. 96-228 (filed Jan. 30, 1997).

<sup>3/</sup> WCA submitted a statement indicating that it could cost the wireless cable industry at least \$125,000,000 to cure WCS interference. Letter to the Federal Communications Commission from Andrew Kreig, Esq., Acting President, The Wireless Cable Association International, Inc., GN Docket No. 96-228 at 1 (filed Jan. 31, 1997) [hereafter cited as "Kreig Letter"]. The National ITFS Association filed supporting comments urging the Commission to adopt BellSouth's proposal in order to preserve ITFS operations from interference. See Letter from Theodore Steinke, Chairman of the Board, National ITFS Ass'n, GN Docket No. 96-228 (filed Feb. 6, 1997). Similar comments were filed by the George Mason University Instructional Foundation, Inc.. See Letter from Michael R. Kelley, Ph.D, President, GN Docket No. 96-228 (filed Jan. 31, 1997).

<sup>4/</sup> *WCS Order* at ¶ 157.

will begin auctioning WCS authorizations that will not be subject to any power limitation. The Commission's failure in the *WCS Order* to impose any power limitation on WCS operations has raised the specter that MDS and ITFS reception will soon be decimated by blanketing interference from high-power WCS transmissions — *blanketing interference that cannot be mitigated by technological means*. Furthermore, the Commission's decision to address the question of WCS interference to MDS and ITFS licensees at a later date if actual interference occurs will create unnecessary uncertainty both for MDS and ITFS licensees and for WCS auction participants, who will be required to bid without knowing what limitations if any may be imposed on WCS licenses in the future.

WCA emphasizes that it has not filed this motion for the purpose of effecting an unreasonable delay of the WCS auction or the provision of WCS service to the public. To the contrary, WCA has requested in its Petition that the Commission establish an expedited pleading schedule that will permit resolution of the issues raised by WCA prior to the scheduled April 15, 1997 commencement date of the auction, an approach similar to one the Commission has taken in prior cases to accommodate deadlines established by Congress. WCA simply requests herein that the Commission stay the rules and policies adopted in the *WCS Order* and the commencement of the WCS auction only as long as necessary to allow for full consideration of the matters raised in WCA's Petition and for the Commission to provide sufficient notice of its decision to WCS auction participants.

## II. DISCUSSION.

The well-settled criteria governing the Commission's consideration of a motion for stay are: (1) whether the movant is likely to prevail on the merits; (2) whether the lack of a stay will result in irreparable injury to the movant; (3) whether the public interest warrants a stay; and (4) whether a stay would result in substantial harm to others.<sup>5/</sup> As demonstrated below, each of these factors weighs decidedly in favor of a temporary stay pending review of WCA's Petition.

### A. *WCA is Likely to Prevail on the Merits.*

It is well established that a federal agency must make findings based on careful consideration of what is in the record.<sup>6/</sup> The Commission's analysis of the problem of WCS interference to MDS and ITFS reception equipment is flawed by apparent misunderstandings regarding the nature of the interference and the prospects for remedial action. Simply stated, the solution envisioned by the Commission — the routine replacement of MDS and ITFS downconverters with equipment capable of rejecting interfering signals from high-power WCS operations — does not exist. The Petition establishes in detail that the *WCS Order* is premised on faulty assumptions regarding the cause of interference from WCS and potential solutions.

At the outset, the Petition establishes that the *WCS Order* is wrongly premised on an

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<sup>5/</sup> *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir. 1977) [*"Holiday Tours"*]; *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

<sup>6/</sup> See, e.g., *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995), citing *Cities of Carlisle and Neola v. FERC*, 741 F.2d 423, 433 (D.C. Cir. 1984).



assumption that MDS and ITFS “downconverters receive all signals throughout the entire 2.1-2.7 GHz band . . . .”<sup>7/</sup> As is discussed in more detail in the Engineering Statement of T. Lauriston Hardin, P.E., Chair of WCA’s Engineering Committee (the “Hardin Statement”) and in the Petition itself, this is not accurate -- many downconverters are limited to the 2500-2690 MHz band. Moreover, regardless of whether a given downconverter operates in the 2.1 GHz and 2.5 GHz bands or only the 2.5 GHz band, the fact is that the current MDS and ITFS downconverters effectively filter all potential interference from previously authorized users of the 2305-2320 and 2345-2360 MHz bands that are being reallocated to WCS. The problem of interference arises (for single band and dual band downconverters alike) not because the installed base of downconverters lack filtering between 2162 MHz and 2500 MHz, but because the Commission is authorizing WCS operations without imposing any limit on power.<sup>8/</sup>

More importantly, the Petition establishes that the Commission’s underlying premise that the potential for blanketing interference from WCS operations will be remedied as the wireless cable industry transitions to digital technology is flawed in several respects. First, many wireless cable systems, particularly those serving more rural communities, are unlikely to convert to digital modulation because the costs associated with digital operations cannot be borne by their limited subscriber base.<sup>9/</sup> For similar reasons, ITFS licensees who operate independently of wireless

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<sup>7/</sup> *WCS Order* at ¶ 157.

<sup>8/</sup> Hardin Statement, at 3.

<sup>9/</sup> See, e.g., Barthold, “A Foggy Road Ahead,” *Cable World*, at 21 (Jan. 27, 1997).

cable systems also have expressed no plans to convert to digital technology and thus will not be required to replace their installed base of downconverters any time soon.

Second, many of the wireless cable systems that anticipate converting to digital modulation have been installing “digital ready” downconverters for some time now, and will not be replacing those downconverters in connection with a conversion to digital transmission technology. These “digital ready” downconverters are equipped with a local oscillator that has improved phase noise performance, an improvement that has no impact on the downconverter’s sensitivity to frequency overload or blanketing interference from WCS signals.<sup>10/</sup> In other words, the use of digital technology has no bearing on the wireless cable industry’s ability to protect against blanketing interference from WCS licensees operating at excessive power.

Third, and most importantly, *it is impossible for equipment manufacturers to design downconverters that will eliminate blanketing interference from WCS where there are no power limitations on WCS licensees.* As noted above, MDS/ITFS downconverters have been designed to avoid interference by filtering out signals from currently authorized users of the 2305-2320 and 2345-2360 MHz bands. As set forth in the letters from Pacific Monolithics and California Amplifier attached to the Hardin Statement, the frequency selectivity for an MDS/ITFS downconverter required to avoid blanketing interference from WCS cannot be defined if WCS

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<sup>10/</sup> Hardin Statement at 1-2 and at Attachment 1 (Letter from Pacific Monolithics, or the “Pacific Letter”) at 2. Indeed, California Amplifier is already supplying digital downconverters to the wireless cable industry and has unequivocally concluded that these downconverters will be subject to harmful WCS interference if they are located closer than 300 feet to a WCS transmitter operating with an EIRP of 20 watts. Hardin Statement at Attachment 2 (Letter from California Amplifier or the “CalAmp Letter”) at 1.

power is unlimited, and there is no known technology that will provide infinite frequency selectivity to ensure that downconverters will not receive signals from WCS transmitters operating with unlimited power.<sup>11/</sup> The inescapable fact is that equipment manufacturers cannot design downconverters that will avoid WCS interference unless they know what WCS power levels they are supposed to protect against. Hence, the only way for the Commission to enable equipment manufacturers to design downconverters that will protect against WCS interference is to impose a specific power limitation on WCS licensees.<sup>12/</sup>

The Petition is also likely to prevail because the Commission's refusal to impose any power limitation on WCS represents an unexplained, dramatic reversal of course, even in this age of "flexible use."<sup>13/</sup> Indeed, the refusal to impose a power limitation on WCS licensees at this time is flatly inconsistent with how the Commission has applied its "flexible use" policy in prior proceedings. For instance, the Commission recently amended Part 15 of its Rules to make available 300 megahertz of spectrum at 5.15-5.35 GHz and 5.725-5.825 GHz for use by a new

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<sup>11/</sup> Pacific Letter at 2; CalAmp Letter at 1. The Commission therefore is mistaken in suggesting that WCS interference to MDS/ITFS licensees arises from their use of downconverters that have "employed an inexpensive design that has minimal frequency selectivity." *WCS Order* at ¶ 157. Rather, WCS interference will arise from the fact that it is impossible to design an MDS/ITFS downconverter with the required frequency selectivity where WCS power is undefined.

<sup>12/</sup> The Commission also is mistaken in assuming that the potential for interference to MDS/ITFS licensees is somehow dependent upon the type and timing of services WCS licensees will provide in the future. It is the absence of any power limitation whatsoever on WCS licensees that raises the specter of blanketing interference to MDS and ITFS licensees, regardless of how and when WCS spectrum is used. *See Hardin Statement* at 2-3; Pacific Letter at 1.

<sup>13/</sup> It is axiomatic that a federal agency must conform to its prior decisions or explain the reason for its departure from precedent. *See, e.g., Gilbert v. N.L.R.B.*, 56 F.3d 1438, 1445 (D.C. Cir. 1995), *citing Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

category of unlicensed equipment, called Unlicensed National Information Infrastructure (“U-NII”) devices.<sup>14/</sup> In so doing, however, the Commission did *not* allow U-NII devices to operate at unlimited power; rather, to protect licensed operations from harmful interference, the Commission established specific power limits for U-NII devices. Also, in the Commission’s *Report and Order* authorizing flexible use of CMRS spectrum, the Commission did not authorize providers of co-primary fixed CMRS services to operate at unlimited power; instead, the Commission required such providers to comply with the maximum power limitations imposed on base and mobile CMRS stations operating on the same frequencies.<sup>15/</sup> And, when the Commission amended its Rules to authorize more flexible use of IVDS spectrum, the Commission adopted a power limit for all mobile IVDS response transmitter units to protect licensees in other services.<sup>16/</sup> Each of these examples demonstrates that the Commission has been careful to ensure that its “flexible use” policy does not override its fundamental obligation to protect existing service providers from harmful interference.<sup>17/</sup> WCA submits that the

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<sup>14/</sup> *In the Matter of Amendment of the Commission’s Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Frequency Range*, ET Docket No. 96-102, FCC 97-5 (rel. Jan. 9, 1997) [hereinafter cited as “*U-NII Order*”].

<sup>15/</sup> *In the Matter of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965, 8978 (1996).

<sup>16/</sup> *In the Matter of Amendment of Part 95 of the Commission’s Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers*, 11 FCC Rcd 6610, 6617 (1996).

<sup>17/</sup> In the Petition, WCA also establishes that the Commission’s decision to permit WCS licensees to interfere with MDS and ITFS operations raises serious constitutional questions. See n. 24, *infra*.

Commission's refusal to do the same for MDS and ITFS licensees vis-a-vis WCS interference is completely arbitrary and therefore is unlikely to survive reconsideration.<sup>18/</sup>

*B. WCA's Members Will Suffer Irreparable Harm in the Absence of a Temporary Stay.*

Substantial disruption of business operations is the very essence of irreparable harm.<sup>19/</sup> Yet, that is precisely the fate that may be suffered by the wireless cable industry and ITFS distance learning operations in the absence of a temporary stay.

The Commission must not forget that wireless cable is a *service-oriented* business that competes directly with incumbent cable operators and, more recently, DBS operators. As the Commission has previously recognized, wireless cable's high signal quality provides it with a strength *vis-a-vis* cable.<sup>20/</sup> But, wireless cable subscribers will not be willing to tolerate interference while the Commission conducts a rulemaking proceeding to consider WCS interference -- given interference free competitors, consumers will instead switch to alternative sources of multichannel video programming.<sup>21/</sup>

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<sup>18/</sup> As WCA discusses in the Petition, WCS licensees may use WCS spectrum to provide MDS service. Obviously, regulatory parity between wireless services cannot be achieved where a WCS licensee is authorized to operate at excessive power and thereby interfere with MDS licensees providing similar services.

<sup>19/</sup> See, e.g., *Holiday Tours*, 559 F.2d at 843 & n.2; accord *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>20/</sup> *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7484-85 (1994).

<sup>21/</sup> The Commission previously has recognized that providing wireless cable operators with an appropriate level of interference protection is essential to making wireless cable service attractive to consumers. See, e.g., *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-*

Such a result not only would be contrary to the Commission's long-standing efforts to promote competition in the multichannel video marketplace,<sup>22/</sup> it would be a breach of faith with those who have made significant investments in bringing about competition through wireless cable. The Commission cannot ignore, for example, that winning bids in the Commission's recent auction of MDS Basic Trading Area authorizations totaled over \$200,000,000.<sup>23/</sup> Wireless cable operators have paid and will continue to pay millions of dollars to ITFS licensees in exchange for the right to lease excess capacity on ITFS channels. And, hundreds of millions of dollars have been spent on the transmission and reception equipment necessary to develop wireless cable and distance learning infrastructures. These investments will be at risk if the Commission fails to take the action requested in this Petition. WCA submits that there is no policy justification for such a result.<sup>24/</sup>

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*Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service*, 10 FCC Rcd 7074, 7078 (1995) [hereinafter cited as "*MDS Second Order on Reconsideration*"].

<sup>22/</sup> A discussion of the Commission's efforts to promote wireless cable can be found at *Amendment of Parts 21 and 74 of the Commission's Rules With Regard To Filing Procedures In The Multipoint Distribution Service and In The Instructional Television Fixed Service*, 10 FCC Rcd 9589, 9591 (1995) and *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 9 FCC Rcd 7665, 7666 (1994). See also, e.g. *Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, FCC 96-304, DA 95-1854 (rel. July 10, 1996).

<sup>23/</sup> See Public Notice, "*Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas*," at 1 (rel. March 29, 1996).

<sup>24/</sup> In considering the policy concerns raised by WCA, the Commission should not ignore the serious Fifth Amendment legal issues, particularly those associated with the Commission's having auctioned MDS BTA authorizations and now adopting WCS rules that could significantly diminish the value of those authorizations. WCA submits that if the Commission does not grant the relief requested by this Petition, the Commission will have engaged in a regulatory taking without just

In addition, the Commission must be particularly attuned to the potential adverse effects of its decision on ITFS educational services. The Commission already has acknowledged the critical role that wireless cable operators play in supporting the ITFS service through lease payments to ITFS licensees.<sup>25/</sup> Thus, any WCS interference to a wireless cable operator's service will necessarily affect the operator's ability to help sustain local ITFS operations. Moreover, the Commission has recognized that ITFS licensees, whether or not they are affiliated with a wireless cable system, provide a unique and valuable source of educational programming that is unavailable through other multichannel technologies.<sup>26/</sup> Much of this programming consists of

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compensation in violation of the Fifth Amendment of the United States Constitution. For example, just as a regulatory taking of land occurs when a governmental regulation "denies an owner economically viable use of his land," the new WCS rules constitute a regulatory taking by depriving BTA authorization holders of the ability to make economically viable use of the rights they acquired from the Commission. *See, e.g., Agins v. Tiburon*, 447 U.S. 255, 260 (1979); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11<sup>th</sup> Cir. 1996). *See also* Tara Susan Becht, "The General Wireless Communications Service: FCC Spectrum Traffic Cop or Broker?" 4 ComLaw Conspectus 95, 102-03 (1996). Similarly, given the financial commitments that MDS and ITFS licensees and wireless cable operators have made over the years in developing their services, all based on regulatory policies that protect incumbents from interference caused by newcomers, any change in those policies that results in substantial economic loss is subject to constitutional challenge.

<sup>25/</sup> *See, e.g., MDS Second Order on Reconsideration*, 10 FCC Rcd at 7078 ("We believe strengthening MDS operators will have important secondary benefits for ITFS licensees, and better enable them to meet their educational service objectives."); *Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994) ["We believe that our endorsement of [ITFS] channel loading will . . . [allow ITFS licensees] flexibility to cultivate their partnerships with wireless cable operators, an arrangement we have sought to nurture over the last decade, to the welfare of the ITFS service and the public . . . . In today's market environment, MMDS channels and ITFS channels are interrelated components of an integrated set of channels used to provide non-broadcast instructional and entertainment programming in a given market."].

<sup>26/</sup> *See, e.g., Amendment of Part 74 of the Commission's Rules*, 101 F.C.C.2d 50, 80 (1985) ["The argument that a unique and significant value of ITFS lies in its ability to reach beyond school walls is persuasive. In this respect, it is imperative to focus on the purpose of ITFS, which is not so much to serve school buildings as to serve students and schools, satisfying the demand for televised

lectures and other formal classroom material offered by local schools to students for credit towards an academic degree or diploma.<sup>27/</sup> Any material WCS interference will undercut the ability of many local educators (whether or not they are affiliated with a wireless cable operator) to deliver course material to their students as scheduled, thereby defeating the primary purpose of the ITFS service.<sup>28/</sup> Historically, the Commission has been extremely careful to provide specific interference protection for ITFS licensees in prior proceedings.<sup>29/</sup>

*C. The Public Interest Warrants a Temporary Stay.*

In all cases the Commission's primary objective in the licensing process must be to preserve the public interest.<sup>30/</sup> Here, the Commission must evaluate whether the public interest is better served by (1) granting the requested temporary stay to allow for full reconsideration and modification of its rules to avoid the potentially serious consequences of its decision to the wireless cable industry, the ITFS service and WCS auction participants, or (2) allowing the

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formal education.”] [hereafter cited as “1985 ITFS Order”].

<sup>27/</sup> The health care community also has become increasingly active in ITFS. For example, ITFS licensees now include teaching hospitals that offer formal programming to medical students. *1985 ITFS Order* at 81. The Commission has observed that teaching hospitals are “unique institutions in providing this specialized ITFS service.” *Id.*

<sup>28/</sup> *Id.* at 80 (“The clear and guiding principle . . . is that the primary purpose of ITFS was at its founding and remains to serve formal academic needs.”).

<sup>29/</sup> See, e.g., *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 13821, 13826 (1995) [amending Section 21.938(c) of the Commission's Rules to require MDS auction winners to correct at their own expense any harmful interference caused to ITFS licensees].

<sup>30/</sup> See 47 U.S.C. §§ 151, 157 and 309(a); *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 216-17 (1943).



auction to go forward as scheduled without a final resolution of the issues raised in WCA's Petition. For the reasons set forth above, the public interest demands that the Commission choose the former. In addition, a temporary stay will enable the Commission to provide WCS auction participants with sufficient advance notice of all interference protection requirements that will be imposed on WCS authorizations before they place valuations on WCS spectrum and devise their bidding strategies. Clearly, the public interest is better served by adopting all relevant interference protection requirements for WCS licensees ahead of the WCS auction and thereby avoiding any post-auction surprises for successful WCS bidders.

*D. A Temporary Stay Will Not Substantially Harm Other Parties.*

There is no evidence that potential WCS bidders will suffer any substantial harm from a temporary postponement of the auction. Indeed, potential WCS bidders will *benefit* from a stay in that it will provide them with additional time to evaluate WCA's technical showing, determine how the potential for severe interference to MDS and ITFS operations will affect their usage of WCS spectrum and submit comments to the Commission that might lead to an expedient resolution of this very significant problem before bidding begins. Against this backdrop, the alternative, *i.e.*, inviting WCS bidders to make substantial investments in WCS spectrum without providing all information necessary to formulate an intelligent bid, has little merit.<sup>31/</sup>

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<sup>31/</sup> The FCC's Wireless Telecommunications Bureau has already expressed some misgivings about forcing WCS bidders to make all necessary preparations for the auction in such a short period of time. *See, e.g.*, "FCC Sets Stage for April 15 WCS Spectrum Auction," *Communications Daily*, at 1, (Mar. 3, 1997) [noting Bureau Chief Farquhar's statement that "It was not the FCC's idea to auction [WCS] spectrum at this time."]; "Debate Rages over Possibility of Spectrum Auctions," *Washington Telecom News* (Feb. 17, 1997) [noting Rep. Tauzin's suggestion that a recent request by the Bureau for a delay of the WCS auction indicates that "the FCC isn't ready to handle [its]

### III. CONCLUSION.

The circumstances of this case weigh heavily in favor of a temporary stay of the WCS auction: (1) WCA's Petition demonstrates that the Commission's basic assumptions in the *WCS Order* are erroneous, and the Petition therefore is likely to succeed on the merits; (2) both the wireless cable industry and distance learning systems will suffer serious, irreparable injury in the absence of a temporary stay; (3) given the consequences of the Commission's decision not to impose a power limitation on WCS licensees, a temporary stay would serve the public interest; and (4) no other parties would be substantially harmed by the grant of a temporary stay.

Accordingly, for the reasons set above, WCA requests that the Commission issue a temporary stay to allow for full consideration of the matters raised in WCA's Petition and for sufficient pre-auction notice of the Commission's decision to all affected parties.

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March 10, 1997

I, Stephen R. Mead, hereby certify that on this 10<sup>th</sup> day of March, 1997, I caused copies of the foregoing Emergency Motion for Stay to be served, by first class postage prepaid U.S. Mail, on the following:

\*Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

\*Commissioner Rachelle B. Chong  
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